

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

RYAN SEIDEMAN,

Defendant.

NO. CR-09-005-RHW

**ORDER DENYING POST-TRIAL
MOTIONS**

Before the Court are Defendant's Motion for Judgment of Acquittal (ECF No. 566); Defendant's Motion for New Trial Based on Newly Discovered Evidence (ECF No. 569); Defendant's Motion to Dismiss Case for Constructive Amendment or Prejudicial Variance of Proof at Trial (ECF No. 572); Motion for New Trial Based on Other Grounds Pursuant to Rule 33(b)(2) (ECF No. 575). A hearing on the motion was held on April 20, 2011. Defendant was present and represented by Stephen Hormel. The Government was represented by Jill Bolton.

1. Defendant's Motion for Judgment of Acquittal (ECF No. 566)

Defendant argues insufficient evidence supported the jury's verdict of guilty on Second Degree Murder. "A claim of insufficient evidence fails if after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Bennett*, 621 F.3d 1131, 1135 (9th Cir. 2010) (internal quotation and citation omitted). This process involves two steps: (1) viewing the evidence produced at trial in the light most favorable to the prosecution; and (2) considering whether the evidence as so construed is sufficient to allow any rational juror to find

1 that the prosecution carried its burden of proof. *Id.*

2 The Court in response to the Defendant's Motion for a Directed Verdict
3 during the trial, summarized some of the evidence that would support a jury verdict
4 of guilty. Post trial, in the Government's brief on this motion, the Government
5 summarizes other evidence that supports the jury verdict (ECF No. 583).

6 Defendant's argument for a Judgment of Acquittal is very similar to the argument
7 to the jury. It does not take into account the inferences that must be made in favor
8 of the verdict and interprets that evidence in a light most favorable to the defense.
9 The Court cannot do that. It finds that substantial evidence supports the verdict.

10 **2. Defendant's Motion for New Trial Based on Newly Discovered**
11 **Evidence (ECF No. 569)**

12 Defendant argues that a new trial is necessary to permit the jury to consider
13 newly discovered evidence, namely the testimony of Samuel Brooks, an individual
14 who submitted a sworn statement to Colville Tribal Police in March of 2006,
15 claiming that he observed and overheard August Jolly around the time of the
16 murder under incriminating circumstances. Although a material witness warrant
17 was issued, Mr. Brooks was never located to testify at Defendant's trial. Mr.
18 Brooks has now been located and indicates that he does not have an independent
19 recollection of the events, but confirms that he wrote the statement on March 29,
20 2006. It is Defendant's intention to call Mr. Brooks as a witness in the new trial
21 and have his statement be admitted as a recorded recollection.

22 To qualify for a new trial based on newly discovered evidence, Defendant
23 must show: "(1) the evidence is newly discovered; (2) the defendant was diligent in
24 seeking the evidence; (3) the evidence is material to the issues at trial; (4) the
25 evidence is not (a) cumulative or (b) merely impeaching; and (5) the evidence
26 indicates the defendant would probably be acquitted in a new trial." *United States*
27 *v. Berry*, 624 F.3d 1031, 1042 (9th Cir. 2010). Under Ninth Circuit law, newly
28 available evidence does not constitute newly discovered evidence. *United States v.*

1 *Diggs*, 649 F.2d 731 (9th Cir. 1981) *overruled on other grounds*, *United States v.*
2 *McConney*, 728 F.2d 1195 (9th Cir. 1984). This rule is generally applied to
3 situations where a defendant who has chosen not to testify comes forward to offer
4 testimony exculpating a co-defendant. *Id.* However, the reasoning behind the rule
5 makes it applicable to this case. As the Ninth Circuit explained, “a court must
6 exercise great caution in considering evidence to be ‘newly discovered’ when it
7 existed all along and was unavailable only because a co-defendant, since
8 convicted, had availed himself of his privilege not to testify.” *United States v.*
9 *Lockett*, 919 F.2d 585, 592 (9th Cir. 1990) (citations omitted).

10 Defendant concedes that Brook’s statement is not newly discovered, nor
11 could he as it is undisputed that he received the statement in discovery. Instead, he
12 argues that he was not able to use Brooks’ statement to impeach Mr. Jolly until he
13 was able to secure Brooks’ testimony for trial. Mr. Jolly was arrested on a material
14 witness warrant issued by the Court at the Defendant’s request and was available
15 to be called as a witness. Defendant assumes that Mr. Jolly, if called as a witness,
16 would deny the events observed in the statement, a fact that is not in the record.
17 He also assumes that he could not ask Jolly about the observations and statements
18 allegedly heard by Brooks without Brooks’ presence as a witness. This contention
19 is also questionable and seems to be more motivated by Defendant’s trial strategy
20 concerning the decision to call Jolly as a witness rather than the absence of Brooks.
21 Regardless, this argument does not change the rule of the law, that is, where a
22 witness’s statement has existed all along and the witness was merely unavailable,
23 the evidence is not newly discovered.

24 In addition, there is no evidence of any effort of Defendant to further seek to
25 obtain the alleged new evidence prior to trial. We do not know if Jolly or Brooks
26 were ever interviewed by the Defense prior to trial, or whether the Defense ever
27 tried to locate the other witnesses to the events allegedly observed by Brooks to
28 obtain the evidence by other means.

1 For all of these reasons, the Court denies Defendant's Motion for New Trial
2 Based on Newly Discovered Evidence.

3 Even if the Court were to consider Brooks' statement as newly discovered, it
4 is necessary for the Court to inquire whether the statement would be admissible
5 under the rules of evidence to determine whether the statement would indicate that
6 Defendant would probably be acquitted at a new trial.

7 Under Fed. R. Evid. 803(5), a recorded recollection is admissible concerning
8 a matter about which a witness once had knowledge, but now has insufficient
9 recollection to enable the witness to testify fully and accurately. It must be shown
10 that the statement had been made or adopted by the witness when the matter was
11 fresh in the witness' memory and to reflect that knowledge correctly. Based on
12 Brooks' confirmation of his signature, the Court assumes that the statement would
13 be admissible as a recorded recollection. However, the recorded recollection must
14 also be admissible under some other rule of evidence.

15 Brooks' statements contain double hearsay. Specifically, he relates how
16 August Jolly and another individual were making sick jokes about the victim, and
17 discussed destroying shoes and clothing to prevent prosecution. Under Fed. R.
18 Evid. 804(b)(3), these statements may be admissible if the declarant testifies as to a
19 lack of memory of the subject matter and the statement is against interest. Whether
20 a statement is sufficiently against a declarant's interest to qualify for the Rule
21 804(b)(3) exception turns on whether "a reasonable person in the declarant's
22 position would not have made the statement unless believing it to be true."
23 *Williamson v. United States*, 512 U.S. 594, 603-04 (1994). To qualify as a Rule
24 804(b)(3) hearsay exception, "the declarant's statements must, in a real and
25 tangible way, subject him to criminal liability." *United States v. Hoyos*, 573 F.2d
26 1111, 1115 (9th Cir. 1978). If the statement exposes the declarant to criminal
27 liability and is offered to exculpate the defendant, it must be corroborated by
28 circumstances indicating its trustworthiness. Fed. R. Evid. 804(b)(3).

1 The statements attributed to Mr. Jolly and an unidentified “person of
2 interest” contained within Brooks’ statement are not sufficiently against penal
3 interests to qualify for the exception. A close look at Brooks’ statement reveals
4 that he never attributes any specific statement to Mr. Jolly or the unidentified
5 person of interest. Brooks used the pronoun “they” and always referred to both of
6 the individuals when referencing statements made by them. In addition, in
7 Brooks’ statement, he states that Mr. Jolly kept saying his life was fucked up. This
8 statement is not against penal interest and would not be admissible under the
9 exception. To the extent that the statement may be against penal interest, on the
10 record before the Court, the Court finds that the statements attributed to August
11 Jolly are not corroborated by circumstances indicating trustworthiness and are
12 therefore not admissible for the truth of the matter asserted.

13 If the Court had found that Brooks’ statement was newly discovered, the
14 Court would still need to determine whether the admissible portions of the
15 statement indicate Defendant would probably be acquitted in a new trial. The
16 admissible portions of the statement would be that on March 20, 2006, Defendant
17 observed August Jolly, who was crying to himself. Mr. Jolly had a scratch on his
18 face, he was confused, his fly was unzipped, he had blood on his pants and his
19 knuckles were swollen. He appeared dazed and was unresponsive to Brooks’
20 questions. These statements were presented to the jury but with a limiting
21 instruction.

22 The Court finds that if the jury were to consider this information without the
23 limiting instruction in determining Defendant’s guilt or innocence, the outcome
24 would have been the same. There was significant circumstantial evidence of
25 Defendant’s guilt. Mr. Jolly’s DNA sample did not match any of the DNA
26 recovered from the crime scene and there was no other evidence at the crime scene
27 that implicated Mr. Jolly. To the contrary, Defendant’s DNA, the victim’s DNA,
28 and Defendant’s clothing were associated with the Defendant at the crime scene.

1 As such, the Court on alternate grounds denies Defendant's Motion for New
2 Trial Based on Newly Discovered Evidence.

3 **3. Defendant's Motion to Dismiss with Prejudice for Constructive**
4 **Amendment or Prejudicial Variance of Proof at Trial**

5 Defendant maintains that at trial the Government changed its proof upon
6 which the grand jury indicted Defendant. Specifically, Defendant argues that the
7 evidence adduced at trial materially differed from the evidence presented to the
8 grand jury as to when the victim died. Defendant raised this argument pre-trial and
9 argued it again at trial. The Court rejected these arguments both times on the
10 record.

11 The case, without Defendant's confession, was based on circumstantial
12 evidence. That evidence indicated that the victim was killed sometime between the
13 morning of March 18, 2006, and the afternoon of March 20, 2006, when her body
14 was found. The Grand Jury Indictment stated that the death occurred 'on or about'
15 March 20, 2006. It is undisputed that Defendant knew that the circumstantial
16 evidence established that the date of death was between the 18th and the 20th since
17 the beginning of the case. In the early motions to suppress the confession, long
18 before the trial, the evidence adduced established the approximate 48 to 60 hour
19 death interval. Defendant was on notice of the range of death interval. Defense
20 counsel was repeatedly asked by the Court before the trial how the defense was
21 prejudiced by the evidence of the range of death interval in light of the 'on or
22 about' language of the Indictment. The response from Counsel for Defendant, for
23 the most part, was that the Grand Jury would not have indicted Defendant for any
24 other date than the 20th and the Notice of Alibi must restrict the Government to the
25 20th. The Court found no prejudice was shown by Defendant and did not dismiss
26 the Indictment or find that there was a prejudicial variance. The Court considered
27 the trial evidence and adheres to its earlier ruling and denies the Motion to Dismiss
28 based on the alleged variance.

1 **4. Defendant's Motion for New Trial on "Other Grounds"**

2 Defendant asserts five additional grounds for a new trial: (1) prejudicial
3 limitation of the defense; (2) admission of clothing from the bag; (3) prejudicial
4 admission of Defendant's photograph; (4) the Government's closing arguments;
5 and (5) cumulative error.

6 The first three issues were addressed during the trial and the basis for the
7 Court's rulings are evident in the record. The Court also summarized its reasons
8 for its rulings on the record at the hearing on April 20, 2011 but will briefly set
9 forth the basis for the rulings again.

10 **1. Prejudicial limitation of the defense**

11 At the beginning of the trial, Defendant put the Court and the Government
12 on notice that it would be attacking the credibility of the investigation. Included in
13 that attack would be questions concerning why the FBI stopped pursuing certain
14 investigative leads. The obvious answer was that the Defendant had confessed and
15 that his confession matched the evidence from the crime scene including details
16 that might only be known to the killer. The Court had previously suppressed the
17 confession and it was clear that it should not be admitted at trial. The Court
18 realized before opening statements that any attack on the investigation after the
19 confession was obtained might be legitimately explained by the confession.
20 Accordingly, it advised Counsel that such a possibility existed and that any
21 questions concerning the reason that the investigators did or did not do something
22 after the date of the confession might open the door to the confession explaining
23 the answer. (ECF No. 539, p.29). The Court did not prohibit such questions and it
24 was never given any offer of proof by the defense upon which it could rule on the
25 propriety of the use of the confession in a response. No such offer of proof of
26 evidence that the Defendant would have presented has been given in the post-trial
27 motions as well. Accordingly, the Court is left to speculate as to what questions
28 would have been asked about the investigation after the confession. It appears to

1 the Court that the Defendant made a strategic decision to not ask such questions or
2 make an offer of proof outside the presence of the jury. As such, the Court does
3 not find that any error occurred on this subject.

4 **2. Admission of clothing from the bag**

5 The Court found that the evidence presented in support of the admission of
6 these exhibits was sufficient to permit the jury to determine that the items were
7 what the witnesses purported them to be. Under Evidence Rule 901, this
8 foundation is enough. Defendant's other arguments concerning the evidence go to
9 the weight the jury should have given the evidence and do not support its
10 exclusion.

11 **3. Prejudicial admission of Defendant's photograph**

12 The photograph was taken of Defendant around the time of the offense and it
13 was not evident that it was a mug shot. The only prejudice raised by Defendant in
14 this motion is that he was shown wearing a tank top. At the crime scene a tank top
15 was found in a bag that included clothing identified with Defendant. The
16 photograph was admissible as showing Defendant at the time of the offense as well
17 as showing that he wore tank tops. The photograph was relevant and there was no
18 unfair prejudice resulting from its admission.

19 **4. The Government's closing arguments**

20 Defendant takes issue with the Government's counsel's closing rebuttal
21 where she stated:

22 This belt that there was a huge fuss about whether or not we could
23 introduce into evidence because the defendant didn't want it to come
24 into evidence—because the evidence shows that this is the belt he was
wearing when he left his house, before he went to the victim's house.

25 There was no objection to this argument and it is reviewed for plain error. If
26 this statement was improper, such impropriety would require reversal only “if it
27 appears more probable than not that the alleged misconduct affected the jury's
28 verdict,” taking into account the strength of the Government's case. *United States*
v Nobari, 574 F.3d 1065, 1082 (9th Cir. 2009) (internal quotations omitted). This

1 single, isolated reference to Defendant's evidentiary objection did not affect the
2 jury's verdict in light of the weight of the evidence supporting the jury's verdict.

3 **5. Cumulative Error**

4 Based on the above-rulings, the Court rejects Defendant's argument that
5 cumulative error warrants a new trial and denies his Motion for New Trial on
6 "Other Grounds."

7 Accordingly, for the reasons stated in this Order and the Court's oral rulings
8 at the April 20, 2011 hearing and in other parts of the trial record, **IT IS HEREBY**
9 **ORDERED:**

10 1. Defendant's Motion for Judgment of Acquittal (ECF No. 566) is
11 **DENIED.**

12 2. Defendant's Motion for New Trial Based on Newly Discovered
13 Evidence (ECF No. 569) is **DENIED.**

14 3. Defendant's Motion to Dismiss Case for Constructive Amendment or
15 Prejudicial Variance of Proof at Trial (ECF No. 572) is **DENIED.**

16 4. Defendant's Motion for New Trial on "Other Grounds" (ECF No.
17 575) is **DENIED.**

18 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
19 order and to provide copies to counsel.

20 **DATED** this 21st day of April, 2011.

21
22 *s/Robert H. Whaley*

23 ROBERT H. WHALEY
24 United States District Judge

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